

BEFORE THE UTAH SOLID AND HAZARDOUS WASTE CONTROL BOARD

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In the Matter of	:	<b>STIPULATION AND</b>
	:	<b>CONSENT ORDER</b>
	:	
Dugway Proving Ground	:	
UT3750211259	:	<u>No. 0604018</u>

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This **STIPULATION AND CONSENT ORDER (SCO)** is issued by the UTAH SOLID AND HAZARDOUS WASTE CONTROL BOARD (the Board) pursuant to the Utah Solid and Hazardous Waste Act (the Act), Section 19-6-101, et seq., Utah Code Annotated 1953, as amended (UCA).

**JURISDICTION**

1. The Board has jurisdiction over the subject matter of this SCO pursuant to 19-6-112 of the Act, and jurisdiction over the parties.

**FINDINGS**

2. Dugway Proving Ground (Dugway) is owned and operated by the U.S. Army and is located in Tooele County, Utah. Dugway has the mission of conducting tests for chemical defense, biological defense, smoke defense and incendiary devices for the Department of Defense. Dugway is divided into six main areas and several test and impact areas. The main areas are Avery, Baker, Carr, Ditto, English Village and Fries Park.

3. Dugway is a "person" as defined in UCA19-1-103(4) and is subject to all applicable provisions of the Act, R315 of the Utah Administrative Code (the Rules), the Part B Permit issued on March 16, 1994 (the Permit) and the Stipulation and Consent Order issued on September 13, 1990 (the Consent Order).

4. Dugway generates, treats, and stores wastes defined as hazardous by R315-2 of the Rules. These wastes include, but are not limited to D001 (ignitable solvents), D002 (waste acids and bases), D003 (reactives), D004-D037 (toxicity characteristic wastes), F001-F003 and F005 (spent solvents), F999 (residues from demilitarization/treatment of chemical agent) and P999 (chemical agent).

5. Dugway owns and operates the Central Hazardous Waste Storage Facility and the Igloo G Hazardous Waste Storage Facility (Storage Permit), and the Open Burning/Open Detonation Treatment Facility (Interim Status).

6. On February 3, 2006, Notice of Violation #0512040 (NOV) was issued to Dugway alleging violations of the Act, the Permit, and applicable rules. This NOV covered the inspection period beginning January 2005 and ending December 2005.

7. On February 28, 2006, Dugway responded to the NOV and reserved its right to a hearing before the Board.

8. On March 2, April 19, and on May 3, 2006 Dugway provided additional information on the NOV during informal meetings held at the Division of Solid and Hazardous Waste office. On May 11, 2006, Dugway responded to the allegations in the NOV in a letter to the Executive Secretary.

### **STIPULATION AND CONSENT ORDER**

9. The parties now wish to fully resolve the NOV and additional inspection findings without further administrative or judicial proceedings. By entering into this SCO, Dugway withdraws its request for a hearing.

10. Within 30 days of the effective date of this SCO, Dugway shall propose to the Executive Secretary a definition for a "significant rain event" that is applicable to all post-closure hazardous waste management units at Dugway. This definition shall identify the quantity of rain that causes the rain event to be classified as significant, the location(s) of measurement, and the method(s) of measurement. This information will be incorporated into the Permit and will require Dugway to conduct inspections of post-closure units after significant rain events.

11. Once this SCO becomes effective, all notifications to the Executive Secretary, as required by the Permit, shall be made by written correspondence to the Executive Secretary, signed by a certifying official.

12. In full settlement of the Board's alleged and potential claims for violations identified in the NOV, Dugway shall pay the sum of \$1,030.00 dollars to the Utah Solid and Hazardous Waste Control Board, c/o Dennis R. Downs, Executive Secretary, P.O. Box 144880, Salt Lake City, Utah 84114-4880. Full payment shall be made within 30 days of the effective date of this SCO.

### **EFFECT OF CONSENT ORDER**

13. For purposes of this SCO, the parties agree to the FINDINGS related herein. None of these FINDINGS shall be considered admissions by any party, and shall not be used by any person related or unrelated to this SCO for purposes other than determining the basis of this SCO. Except for Paragraph 1, which Dugway and the US Army admit, Dugway and the US Army neither admit nor deny any allegation of fact or law set forth in this SCO.

14. Nothing contained in this SCO shall be deemed to constitute a waiver by the State of its right to initiate enforcement action, including civil penalties, against Dugway in the event of future non-compliance with this SCO, the Part B Permit, the Act, the Consent Order, or the Rules; nor

shall the State be precluded in any way from taking appropriate action should such a situation arise at Dugway. However, entry into and compliance with this SCO shall relieve Dugway of all liability for violations alleged in the NOV.

### **ANTI-DEFICIENCY ACT**

15. Dugway shall seek all funds necessary for the payment of civil penalties under this SCO by the most expeditious means possible and, if necessary, shall seek new authorization from Congress to achieve the most expeditious schedule of such compliance in accordance with Sections 1-4 and 1-5 of Executive Order 12088. Section 1-5 of Executive Order 12088 states "the head of each executive agency shall ensure that sufficient funds for compliance with applicable pollution control standards are requested in the Agency budget."

16. However, payment or obligation of funds by Dugway pursuant to this SCO shall be subject to the availability of appropriated funds, and no provision herein shall be interpreted to require obligation or payment of funds in violation of the Anti-Deficiency Act, 31 United States Code Section 1341. Failure to obtain adequate funds or appropriation from Congress does not, in any way, release Dugway from its obligations to comply with the Resource Conservation and Recovery Act, as amended, 42 U.S.C. Section 6901 *et seq.*, or the Utah Solid and Hazardous Waste Act, Section 19-6-101 *et seq.*, as amended including the payment of fines or penalties, or performance of supplemental environmental projects. Where payment or obligation of such funds would constitute a violation of the Anti-Deficiency Act, the time frames established in this section requiring the payment or obligation of these funds shall be appropriately adjusted.

17. The parties agree that in any judicial proceeding to enforce the requirements of this SCO, Dugway may raise a defense that any failure or delay was caused by the unavailability of appropriated funds.

### **FORCE MAJEURE**

18. Dugway shall perform the requirements of this SCO within the time frames set forth herein unless the performance is prevented or delayed by events which constitute a force majeure.

(a) A force majeure is defined as any event arising from causes not reasonably foreseeable and beyond the control of Dugway which cannot be overcome by due diligence. A force majeure shall mean any event arising from causes beyond the control of a party that causes a delay in or prevents the performance of any obligation under this SCO, including but not limited to, acts of God, fire, war, insurrection, civil disturbance, explosion, unanticipated breakage or accident to machinery, equipment or lines of pipe despite reasonably diligent maintenance, adverse weather conditions that could not be reasonably anticipated, unusual delay in transportation, restraint by court order or order of public authority, inability to obtain, at reasonable cost and after exercise of reasonable diligence, any necessary authorizations, approvals, permits or licenses due to action or inactions of any governmental agency or authority other than Dugway, delays caused by

compliance with applicable statutes or regulations governing contracting, procurement or acquisition procedures, despite the exercise of reasonable diligence and insufficient availability of appropriated funds, if Dugway shall have made timely request for such funds as part of the budgetary process. A force majeure shall also include any strike or other labor dispute, whether or not within the control of a party affected thereby. Force majeure shall not include increased costs or expenses of an action, whether or not anticipated at the time of the action was initiated.

(b) Within seventy-two (72) hours of the time that Dugway knows or has reason to know of the occurrence of any event which Dugway has reason to believe may prevent its timely compliance with any requirement under this SCO, Dugway shall provide oral notification to the Executive Secretary. Within seven (7) calendar days of the discovery of the event, Dugway shall submit to the Executive Secretary a written description of the event causing the delay, the reasons for the delay, the expected duration of the delay, actions which will be taken to mitigate the duration of the delay and a revised time frame for completion of the affected requirement for approval by the Executive Secretary.

(c) The burden of proving that any delay was caused by a force majeure and that the required notices were given shall at all times rest with Dugway. Delay in the achievement of one requirement shall not necessarily justify or excuse delay in the achievement of subsequent requirements. In the event any performance under this SCO is found to have been delayed by a force majeure, Dugway shall perform the requirements of this SCO that were delayed by the force majeure within the revised time frame for compliance as approved by the Executive Secretary.

### **MODIFICATIONS**

19. If modifications are necessary, Dugway and the Board may duly modify this SCO with a letter signed by Dugway and the Executive Secretary.

### **EFFECTIVE DATE**

20. This SCO shall become effective upon execution by Dugway and the Executive Secretary of the Utah Solid and Hazardous Waste Control Board.

Dugway Proving Ground

Utah Solid and Hazardous Waste  
Control Board

By:\_\_\_\_\_

Colonel Greg D. Olson  
Commanding Officer

By:\_\_\_\_\_

Dennis R. Downs  
Executive Secretary

Dated this\_\_\_\_\_day of\_\_\_\_\_, 2006.

Company Name: Dugway Proving Ground  
ID#: UT3750211259

NOV#: 0513040  
February 2006

Prepared By: Doug Taylor  
June 2006

Finding number (from NOV)	1	2	3	
Finding Description	Failure to Inspect HWMU 2	Failure to follow QAPP and WAP	Failure to Notify	
1. Gravity based penalty from the matrix		\$200.00	\$780.00	
(a) Potential for Harm	Minor	Minor	Major	
(b) Extent of Deviation	Major	Minor	Minor	
2. Select an amount from the appropriate multiday matrix cell				
(a) Number of days of violation				
3. Multiply Item 2 by the number of days of violation minus 1 (or other number, as appropriate)	\$0.00	\$0.00	\$0.00	
4. Add items 1 and 3	\$0.00	\$200.00	\$780.00	
5. Good Faith				
(a) Percent increase	0%	0%	0%	
(b) Percent decrease	0%	0%	0%	
6. Willfulness/negligence				
(a) Percent increase	0%	0%	0%	
(b) Percent decrease	0%	0%	0%	
7. History of compliance/noncompliance				
(a) Percent increase	0%	25%	0%	
(b) Percent decrease	0%	0%	0%	
8. Other unique factors (except litigation risk)				
(a) Percent increase	0%	0%	0%	
(b) Percent decrease		0%	0%	
9. Total items 5 through 8	0%	25%	0%	
10. Multiply item 4 by item 9	\$0.00	\$50.00	\$0.00	
11. Add items 4 and 10	\$0.00	\$250.00	\$780.00	
12. Adjustment for environmental project				
13. Subtract item 12 from item 11	\$0.00	\$250.00	\$780.00	
14. Calculate economic benefit				
15. Add items 13 and 14	\$0.00	\$250.00	\$780.00	
16. Adjustment amount for ability to pay				
17. Adjustment amount for litigation risk				
18. Add items 16 and 17	\$0.00	\$0.00	\$0.00	
19. Subtract item 18 from item 15 for final settlement total		<b>\$250.00</b>	<b>\$780.00</b>	

TOTAL THIS PAGE =	<b>\$1,030</b>	RUNNING TOTAL =	<b>\$1,030</b>
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**UTAH DIVISION OF SOLID AND HAZARDOUS WASTE  
SETTLEMENT PENALTY NARRATIVE**

Dugway  
NOV 0513040

Finding 1

**Finding Description – Failure to inspect HWMU 2 after a significant rain event.**

Gravity based penalty from the matrix

- (a) Potential for Harm – Minor – The landfill is fenced and locked so there was no access to the waste if it was uncovered.
- (b) Extent of Deviation – Major – Dugway did not inspect after the rain event.

Multi-Day Penalty – N/A

Percent increase/decrease for good faith – N/A

Percent increase/decrease for willfulness/negligence – NA

Percent increase/decrease for history of compliance/non-compliance – NA  
N/A

Percent increase/decrease for other unique factors – N/A

Increase for economic benefit – N/A

Recalculation of Penalty based on New Information – After a legal and technical review, it was determined that the standard for inspection was not clear. No penalty will be collected.

**UTAH DIVISION OF SOLID AND HAZARDOUS WASTE  
SETTLEMENT PENALTY NARRATIVE**

Dugway  
NOV 0513040

Finding 2

**Finding Description – Dugway failed to follow its Waste Analysis Plan and Quality Assurance Project Plan.**

Gravity based penalty from the matrix

- (a) Potential for Harm – Minor – The waste was conservatively characterized and managed as a hazardous waste.
- (b) Extent of Deviation – Minor – The WAP and QAPP requirements are correctly followed a majority of the time.

Multi-Day Penalty – N/A

Percent increase/decrease for good faith – N/A

Percent increase/decrease for willfulness/negligence – N/A

Percent increase/decrease for history of compliance/non-compliance – Dugway has failed to produce CASARM sheets or purity certifications to the inspectors during the inspection for three years. Although eventually produced, the rules require information to be produced so the inspectors can review data at the time of the inspection.

Percent increase/decrease for other unique factors – N/A

Increase for economic benefit – N/A

Recalculation of Penalty based on New Information – N/A

**UTAH DIVISION OF SOLID AND HAZARDOUS WASTE  
SETTLEMENT PENALTY NARRATIVE**

Dugway  
NOV 0513040

Finding 3

**Finding Description – Dugway failed to notify the beginning of work at HWMU 51 and 90.**

Gravity based penalty from the matrix

- (a) Potential for Harm – Major – A major part of the Division's corrective action oversight is the ability to inspect construction activities. In this case the failure to notify denied the Division inspectors the ability to oversight the placement of a final landfill cap. This caused harm to the Division oversight program.
- (b) Extent of Deviation - Minor – Dugway notifies the Division of construction activity a majority of the time.

Multi-Day Penalty – N/A

Percent increase/decrease for good faith – N/A

Percent increase/decrease for willfulness/negligence – N/A

Percent increase/decrease for history of compliance/non-compliance – N/A

Percent increase/decrease for other unique factors – N/A

Increase for economic benefit – N/A

Recalculation of Penalty based on New Information – N/A